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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

TEXTRON, INC., ET AL,
Petitioners,

v.

MASSACHUSETTS COMMISSIONER OF REVENUE
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION OF MASSACHUSETTS COMMISSIONER OF REVENUE

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Question Presented

Does the Court have jurisdiction to review a challenge to a state tax under the Commerce Clause where the court below determined that

(1) the taxpayers were not adversely affected by the allegedly disparate treatment;

(2) the record did not establish an adverse effect implicating the Clause;

(3) in any event, administrative action by the state allowed the taxpayers to avoid any claimed adverse effect; and

(4) plaintiffs were not entitled to a judgment striking the entire Massachusetts corporate excise tax.

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Jurisdiction

Because an independent and adequate state ground supports the judgment below, regardless of the facial constitutionality of the challenged state corporate excise tax, this Court lacks jurisdiction to review the portions of the petition pertaining to the remedy sought by the taxpayer. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

Facts

For purposes of this Brief in Opposition to the Petition for a Writ of Certiorari, the Respondent Massachusetts Commissioner of Revenue accepts and incorporates by reference the facts set forth in the decision of the Supreme Judicial Court. *Textron, Inc. v. Commissioner of Revenue*, 756 N.E.2d 1142, 435 Mass. 297 (2001) (reproduced in Appendix to Petition for a Writ of Certiorari at 1a-18a). In particular, see Appendix, at 3a-11a.

Reasons for Denying the Writ

I. THIS COURT LACKS JURISDICTION TO REVIEW THE SUPREME JUDICIAL COURT'S DENIAL OF THE REMEDY PETITIONERS SEEK, WHICH RESTS SOLELY ON STATE LAW.

This Court lacks jurisdiction to review a state-court judgment based on independent and adequate state grounds. *See generally* Robert L. Stern *et al.*, *Supreme Court Practice*, § 3.21, at 140-41 (7th ed. 1993) (collecting authorities). More specifically, "if the same judgment would be rendered by the state court after [this Court] corrected its view of federal laws, [this Court's] review would amount to nothing more than an advisory opinion," the issuance of which lies outside the Court's authority. *Herb*, 324 U.S. at 126. Because the Supreme Judicial Court correctly denied to the petitioners the state-law remedy that they seek, even if it incorrectly decided the federal Commerce Clause claims, any decision by this Court would be a mere advisory opinion.

Petitioners claim that (1) the Supreme Judicial Court erred in determining that petitioners failed to demonstrate that the challenged provisions of the Massachusetts corporate excise tax violate the Commerce Clause; and (2) because the challenged provisions are unconstitutional, Massachusetts law requires that the entire corporate excise tax law be set aside. *See* Petition at 15-16. Because Massachusetts law does not permit the corporate excise tax law to be set aside in this circumstance--even if the petitioners succeed on their facial constitutional claims--this Court cannot direct the petitioners'

desired result.

A. *The essence of the petitioners' claim is for a remedy governed by state law and unavailable under state law.*

The Massachusetts corporate excise tax is codified at M.G.L. c. 63, §§ 30-42B. Section 52 of Chapter 63 dictates the remedy in the event that any of these sections is invalidated. M.G.L. c. 63, § 52 (reproduced in Appendix to Petition at 53a-56a). Section 52 provides that, if Sections 32, 38C, 39, or 42B of Chapter 63--the provisions actually imposing the tax--are "declared unconstitutional or inoperative by a final judgment, order or decree of the supreme court of the United States or of the supreme judicial court of the commonwealth," then the "repeal-and-revive" remedy sought by petitioners applies. *See* M.G.L. c. 63, § 52 (Appendix, at 53a-56a).[1] If any other section of the corporate excise law (Section 30, 31A-31H, 32B-32D, 33, 38A-38B, 38D-38Q, 39A, 42, or 42A) is "declared unconstitutional or inoperative, the remaining parts of said sections thirty to forty-two B, inclusive, shall not be affected thereby." *See* M.G.L. c. 63, § 52 (Appendix, at 56a).

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[1]If invoked, the "repeal-and-revive" remedy would nullify the current Massachusetts corporate excise tax law and replace it with the state law in effect before 1919. M.G.L. c. 63, § 52 (Appendix, at 54a-55a). Under the pre-1919 law, the annual Massachusetts non-income excise measure for Petitioners and all other corporate taxpayers could not exceed $2000. Appendix, at 78a. Thus, application of the "repeal-and-revive" remedy would result in significant tax savings for the Petitioners and *amicus* General Motors Corporation. *See* Petition, at 23; Appendix, at 78a.

The petition is not within the jurisdiction of the Court because the petitioners' claim is one under state law. In rejecting the petitioners' claim, the Supreme Judicial Court noted that the "unambiguous" language of Section 52 makes the "repeal-and-revive" remedy inapplicable to the petitioners' challenge to Section 30, even if it were successful. *Textron, Inc.*, 756 N.E.2d at 1150 n.14, 435 Mass. at 308 n.14 (Appendix, 17a n.14). The Supreme Judicial Court followed longstanding precedent in declining to "stretch[]" Section 52 "to cover facts not within its fair meaning." *See id., citing* W *& J Sloane v. Commonwealth of Massachusetts,* 149 N.E. 407, 409, 253 Mass. 529, 535 (1925). The Supreme Judicial Court properly applied the plain language of Section 52 to conclude that the "repeal-and-revive" remedy would not apply even if that Court had found the challenged paragraphs of Section 30 unconstitutional. *See Textron, Inc.*, 756 N.E.2d at 1150 n.14, 435 Mass. at 308 n.14 (Appendix, 17a n.14) ("Accordingly the 'repeal and revival' remedy would not have been available to Textron notwithstanding our decision today."). The Supreme Judicial Court had reached the same result 72 years before in considering whether the "repeal-and-revive" remedy should be applied following this Court's invalidation of one paragraph of Section 30. *See Opinion of the Justices to the Governor and Council*, 168 N.E. 563, 538, 269 Mass. 611, 617-18 (1929) (opining that the "repeal-and-revive" remedy is "too violent an inference or construction to be warranted" in that circumstance). Thus, even if this Court were to reverse the Supreme Judicial Court as to the constitutionality of the four challenged paragraphs of Section 30, the petitioners still would not be entitled to the remedy they seek. The judgment denying the remedy rests on an independent and adequate state ground. Consequently, jurisdiction is lacking over the petition.

B. *The petitioners cannot establish this Court's jurisdiction over the judgment denying the state-law remedy by arguing that their preferred application of state law is constitutionally required.*

In order to gain a jurisdictional foothold, the petitioners argue that due process requires the application of the "repeal-and-revive" remedy and the consequent dismantling of the corporate excise tax structure that has been in place in Massachusetts for 82 years. *See* Petition at 25-28. Any other remedy, petitioners assert, constitutes a "bait-and-switch" maneuver in violation of due process. *Id.* This argument should be rejected for two reasons.

First, in Commerce Clause cases, due process is satisfied by any remedy that results in a non-discriminatory assessment. *See McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Business Regulation of Fla.*, 496 U.S. 18, 41 (1941). In fact, the Supreme Judicial Court held that the Commissioner's application of the statute here did result in a nondiscriminatory assessment. *See Textron, Inc.*, 756 N.E.2d at 1151, 435 Mass. at 309 (Appendix, 18a). Thus, even if petitioners could succeed in showing constitutional infirmity in M.G.L. c. 63, § 30, they would not be constitutionally entitled to the "repeal-and-revive" remedy.

Second, petitioners cannot articulate a "bait-and-switch" challenge where they were never statutorily entitled to the remedy they seek.[2] The Massachusetts "hook" was never "baited" with the

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[2]The "repeal-and-revive" remedy has not been revoked or compromised in any way and remains available as the remedy to be employed if Sections 32, 38C, 39, or 42B are ever struck down by

"repeal-and-revival" remedy for constitutional violations in Section 30 of Chapter 63. *See* M.G.L. c. 63, § 52 (Appendix, at 56a) and discussion above (if sections other than 32, 38C, 39, or 42B are declared unconstitutional, those sections shall be severed without effect on other sections). Because no reasonable taxpayer reading the plain language of Section 52 could have believed that the "repeal-and-revive" remedy had ever been available for successful constitutional challenges to Section 30, its unavailability for the petitioners here has no due-process implications. *Cf. Reich v. Collins*, 513 U.S. 106, 111 (1994) (due process may restrict changing a remedy that reasonable taxpayers believed was actually available to them); *City of New York v. State*, 730 N.E.2d 920, 923 (N.Y. 2000) (assuming without discussion that "poison-pill" provision applied).

In sum, the Supreme Judicial Court's judgment denying the petitioners the "repeal-and-revive" remedy rests solely on that court's interpretation of state law, which does not implicate due-process concerns. Thus, this Court lacks jurisdiction to review the judgment. Because this Court's "power is to correct wrong judgments, not to revise opinions," the petition is not reviewable here and should be denied. *See Herb*, 324 U.S. at 126.

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this Court or by the Supreme Judicial Court. *See* M.G.L. c. 63, § 52 (Appendix, at 53a-56a).

II. THE UNIQUE FACTS CONCERNING THE TAXPAYER AND STATE ADMINISTRATIVE ACTION SHOW THAT THE PETITION DOES NOT RAISE MATTERS OF NATIONAL IMPORTANCE OR APPLICABILITY.

A. *The remainder of the petition asserts nothing more than that the Supreme Judicial Court erred when it concluded that the petitioners failed to show that Section 30 is constitutionally invalid.*

The balance of the petition claims merely that the Supreme Judicial Court erred when it concluded that the petitioners failed to show that M.G.L. c. 63, § 30(8),(9),(10), and (11) violate the Commerce Clause. *See* Petition at 16-22 (court erred in concluding that provisions do not unduly discriminate against interstate commerce); 22-25 (court erred in concluding that petitioners lacked standing); 28-29 (court's errors undermine integrity of constitutional protections for interstate commerce). While this Court may have jurisdiction to review the lower court's rejection of the petitioners' Commerce Clause claims, this case does not rise to the level of national importance warranting this Court's intervention and, therefore, the petition should be denied. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

B. *The Supreme Judicial Court did not err in concluding that the petitioners failed to demonstrate that the challenged provisions discriminate against interstate commerce.*

This Court should not grant the petition because the court below correctly rejected the petitioners' Commerce Clause claims.

1. The Supreme Judicial Court correctly concluded that the petitioners lacked standing to assert their challenge.

The Supreme Judicial Court did not err in concluding that the petitioners lack standing. The facts concerning standing were stipulated. First, as to paragraphs (10) and (11) of Section 30 (the "classification provisions"), none of the six petitioners has standing because they stipulated that they all would have retained the same classification (*i.e.*, "tangible-property" corporation *vs.* "intangible-property" corporation) regardless of which classification provision applied. *See Textron, Inc.*, 756 N.E.2d at 1148, 435 Mass. at 304 (Appendix, 12a). Thus, the court below correctly concluded that any difference between paragraph (10) and paragraph (11) had no effect on any of the petitioners and may not be challenged by them. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (no standing to sue in absence of "concrete and particularized harm").

Next, paragraphs (8) and (9) of Section 30 (the "net-worth provisions") define net worth for intangible-property corporations and thus apply to only one of the six petitioners, Textron, Inc.

("Textron").[3] Textron had zero taxable net worth for the subject tax years. *See Textron, Inc.*, 756 N.E.2d at 1149, 435 Mass. at 306 (Appendix, 14a). Thus, the Supreme Judicial Court held Textron lacked standing to challenge these provisions.[4]

2. Even assuming standing, the petitioners still failed to make out a case of discrimination against interstate commerce.

Although it concluded that Textron was not harmed by paragraphs (8) and (9) of Section 30, the Supreme Judicial Court assumed Textron's standing "for purposes of certainty and predictability of the corporate excise tax law." *See Textron, Inc.*, 756 N.E.2d at 1149, 435 Mass. at 306 (Appendix, at 14a). While recognizing the textual distinctions between paragraph (8) (pertaining

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[3]As tangible-property corporations, the other five petitioners determine their taxable net worth under M.G.L. c. 63, § 30(7), the constitutionality of which is not challenged here.

[4]All six petitioners attempt to "reverse-engineer" standing by arguing that, as corporate taxpayers in Massachusetts, they will benefit if the corporate excise tax law is dismantled and replaced with the pre-1919 law, under which their annual non-income excise measure could not exceed $2000. *See* Petition at 23 ("Petitioners stand to recover more than $900,000 in taxes paid[]" if the pre-1919 law were revived.); Appendix, at 78a. Rejecting this argument, the Supreme Judicial Court pronounced it "circular and without merit." *See Textron, Inc.*, 756 N.E.2d at 1148 n.12, 435 Mass. at 305 n.12 (Appendix, at 13a n.12). Because the petitioners were not harmed by the challenged provisions--regardless of the potential windfall to them if the "repeal-and-revive" remedy should be invoked--they lack standing to challenge them. *See Lujan*, 504 U.S. at 560.

to in-state corporations) and paragraph (9) (pertaining to out-of-state corporations), the Supreme Judicial Court noted the failure of the record to demonstrate any discriminatory effect from these distinctions:

> What is unclear, however, is how the different formulae adversely affect foreign corporations (for example, by resulting in a higher taxable net worth than for a comparable domestic corporation) or impermissibly burden interstate commerce (for example, by discouraging foreign corporations from doing business in the Commonwealth, or domestic corporations from acquiring foreign subsidiaries).

Textron, Inc., 756 N.E.2d at 1149, 435 Mass. at 307 (Appendix, at 15a). Without a negative effect on interstate commerce, there is no Commerce-Clause violation. *See Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (no Commerce Clause violation where law "regulates evenhandedly with only incidental effects on interstate commerce.") (internal quotation omitted). Because the petitioners failed to demonstrate any unconstitutional effect of the provisions they challenge, the Supreme Judicial Court properly rejected their claims.[5]

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[5] *Amicus* General Motors Corporation ("General Motors") challenges a feature of M.G.L. c. 63, § 30(8) that was not challenged by the petitioners below: a deduction from net worth for tangible property situated in Massachusetts and subject to local (municipal) taxation. *See* Brief of General Motors Corporation as *Amicus Curiae* in Support of Petitioner, at 5. Because the argument General Motors makes was not raised below, it should not be considered by

3. Any disparate effects of Section 30 have been eliminated through state administrative action, which allowed Textron, Inc., to claim zero taxable net worth for the tax years in question.

Finally, even if the challenged calculation methods did yield different results for foreign and domestic corporations, any constitutional effect of that difference was "erased" by the Commissioner's issuance of administrative guidance allowing corporate taxpayers to choose the most beneficial calculation formula each year. *See Textron, Inc.*, 756 N.E.2d at 1149, 435 Mass. at 307 (Appendix, at 16a). The most beneficial formula for Textron yielded a taxable net worth of zero. *Id.* The Supreme Judicial Court rejected the petitioners' state-law claim--also not subject to review in this Court--that the Massachusetts Commissioner of Revenue lacked

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this Court. *See generally* Robert L. Stern et al., *Supreme Court Practice*, § 3.17, at 126-27 (7th ed. 1993). In any event, the claim lacks merit because General Motors fails to appreciate the complementary nature of the allowable deduction. The deduction expressly references local property taxes, signalling its purpose to partially offset the higher local property taxes paid by owners of in-state tangible property by way of a corresponding deduction from the net-worth component of the corporate excise tax. Because out-of-state tangible property is not taxed locally, it may be included in the net-worth component without offending the negative Commerce Clause. *See Oregon Waste Systems, Inc. v. Department of Envtl. Quality of Oregon*, 511 U.S. 93, 102-03 (1994) (recognizing constitutional validity of tax on interstate commerce that is "the rough equivalent of an identifiable and 'substantially similar' tax on intrastate commerce"). For these reasons, General Motors raises no issues warranting this Court's review.

authority to issue this guidance. The lower court instead concluded that "the commissioner has lawful discretion not to enforce a doubtful statute or, as here, to interpret a statute in a manner that avoids potential constitutional issues." *Id.*, *citing Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). In issuing his administrative guidance, the Massachusetts Commissioner of Revenue properly exercised his enforcement authority under state law.

The petitioners' quarrel with the Commissioner's administrative guidance ("DD 99-1") rests in their characterization of it as a replacement remedy administratively supplanting the legislative "repeal-and-revive" remedy they would prefer. *See* Petition, at 25-28. DD 99-1 does not, however, purport to be any sort of "remedy." Rather, it represents only the reduction to writing of the Commissioner's valid internal policy decision not to enforce the textual distinctions between provisions relating to in-state corporations and those relating to out-of-state corporations. *See Textron, Inc.*, 756 N.E.2d at 1150, 435 Mass. at 307 (Appendix, at 16a). Thus, DD 99-1 interferes in no way with the proper application of the "repeal-and-revive" remedy.

Even if DD 99-1 did purport to remediate unconstitutional geographic distinctions in Massachusetts's corporate excise law, it does not replace any legislative remedy as far as these petitioners are concerned. As discussed above at I.B., the "repeal-and-revive" remedy sought by the petitioners was never available to them and so could not have been taken from them. The Supreme Judicial Court correctly rejected the petitioners' state-law challenge to the effect of the Commissioner's administrative directive. That ruling is not within the jurisdiction of this Court to review by certiorari and thus the petition should be denied.

Conclusion

For the reasons stated here, the Petition for a Writ of Certiorari should be denied.

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